

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

**DEFENDANTS’ JOINT MOTION TO PRECLUDE TESTIMONY, VOUCHING, OR
PERSONAL REMINISCENCES OF COUNSEL**

In recent argument on the parties’ various motions, counsel for the State has referred to counsel’s personal experiences, memories, or motivations relating to the Illinois River Watershed. *See* Aug. 18, 2009 Transcript at 79:20 – 80:3 (“MR. NANCE: But as for injunctive relief to protect the public there, to protect the kids that swim in the river. You know, I was first on the river in the early '70s with a church group canoeing it, and then went back with the Boy Scouts and my son a few years ago and it's different. THE COURT: Absolutely. MR. NANCE: And, you know, some day I may get to do it with my grandkids and I would like it to be cleaner then than it is now.”).

It is well established that the personal experiences, memories, or motivations of the lawyers in a case are irrelevant, and that any reference to the lawyers’ knowledge of the facts, or personal views of the issues or evidence is improper. *United States v. Young*, 470 U.S. 1, 8-9 (1985) (“Defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of his case”); *Douglas v. Workman*, 560 F.3d 1156, 1179 (10th Cir. 2009) (“vouching for the credibility of witnesses is equally as improper as other methods of ‘offering

unsolicited personal views on the evidence’”) (quoting *Young*, 470 U.S. at 7-8 (1985)); *Slagle v. Bagley*, 457 F.3d 501, 523 (6th Cir. 2006); *Ramey v. District 141, Intern. Ass'n of Machinists and Aerospace Workers*, 378 F.3d 269, 282-83 (2d Cir. 2004) (“when one individual assumes the role of both advocate and witness it ‘[may] so blur[] the line between argument and evidence that the jury's ability to find facts is undermined’”) (quoting *United States v. Arrington*, 867 F.2d 122, 126 (2d Cir. 1989)); *Cargle v. Mullin*, 317 F.3d 1196, 1219 (10th Cir. 2003); *United States v. Swafford*, 766 F.2d 426, 428 (10th Cir. 1985) (“Both case law and the Code of Professional Responsibility identify a lawyer's assertion of personal opinion during trial as an example of improper advocacy.”); *United States v. Prantil*, 764 F.2d 548, 553 (9th Cir. 1985) (“[A]dherence to this time-honored [advocate-witness] rule is more than just an ethical obligation of individual counsel; enforcement of the rule is a matter of institutional concern implicating the basic foundations of our system of justice”); *United States v. Birdman*, 602 F.2d 547, 554 (3d Cir. 1979) (“[T]he prosecutor's testifying might ‘create... confusion on the part of the jury as to whether he (is) speaking in his capacity of prosecutor or witness’”) (quoting *Newman v. Sigler*, 421 F.2d 1377, 1379 (8th Cir. 1970)). This rule is supported by a host of reasons, including that the advocate will not be a fully objective witness, the prestige of the advocate’s position will artificially enhance his credibility, the jury will be confused as to when the advocate-witness is speaking in his capacity as advocate or witness, and the proffering of evidence by an attorney gives the appearance of professional impropriety. *See, e.g., Birdman*, 602 F.2d at 553-54; *Prantil*, 764 F.2d at 553 (“[T]he [advocate-witness] rule obviates the possibility of jury confusion from the dual role of the prosecutor wherein the trier-of-fact is asked to segregate the exhortations of the advocate from the testimonial accounts of the witness”). For all of these reasons, attorneys may not make statements relating to their personal experiences, memories or views relating to the subject matter of the case. *United States v. Primrose*, 718 F.2d 1484,

1493 (10th Cir. 1983) (“Attorneys may not express their personal beliefs concerning the evidence or the witnesses”); *United States v. Grabiec*, 96 F.3d 549, 550 (1st Cir. 1996) (“[W]e have long held that counsel must not express a personal opinion”).

Although the deadline for filing motions *in limine* has passed, this issue arose only recently with the delivery of the transcript from oral argument. Defendants raise this issue by pretrial motion in the hope that it will be helpful to the Court and the parties by avoiding unnecessary objections at trial.

CONCLUSION

For the foregoing reasons, Defendants request that the Court instruct the attorneys to avoid any reference to their personal experiences, memories, beliefs, or motivations in this case.

Respectfully submitted,

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